

UNITED STATES OF AMERICA  
UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

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DON E. TOWNSEND,

Petitioner,

Case No. 1:13-cv-488

v.

Honorable Paul L. Maloney

WILLIE O. SMITH,

Respondent.

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**REPORT AND RECOMMENDATION**

This is a habeas corpus action brought by a state prisoner pursuant to 28 U.S.C. § 2254. Promptly after the filing of a petition for habeas corpus, the Court must undertake a preliminary review of the petition to determine whether “it plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief in the district court.” Rule 4, RULES GOVERNING § 2254 CASES; *see* 28 U.S.C. § 2243. If so, the petition must be summarily dismissed. Rule 4; *see Allen v. Perini*, 424 F.2d 134, 141 (6th Cir. 1970) (district court has the duty to “screen out” petitions that lack merit on their face). A dismissal under Rule 4 includes those petitions which raise legally frivolous claims, as well as those containing factual allegations that are palpably incredible or false. *Carson v. Burke*, 178 F.3d 434, 436-37 (6th Cir. 1999). The Court may *sua sponte* dismiss a habeas action as time-barred under 28 U.S.C. § 2244(d). *Day v. McDonough*, 547 U.S. 198, 209 (2006). After undertaking the review required by Rule 4, I conclude that the petition is barred by the one-year statute of limitations.

## **Discussion**

### **I. Factual Allegations**

Petitioner Don E. Townsend presently is incarcerated at the Carson City Correctional Facility. Petitioner pleaded guilty in the Muskegon County Circuit Court to one count of carrying a concealed weapon, MICH. COMP. LAWS § 750.227, and to being a fourth felony offender, MICH. COMP. LAWS § 769.12. The plea was entered pursuant to a *Cobbs* agreement, under which Petitioner agreed to a four-year term of probation, the first year of which was to be served in the county jail. *See People v. Cobbs*, 505 N.W.2d 208 (Mich. 1993) (authorizing guilty pleas based on sentencing judge's agreement to a tentative sentence, with defendant reserving the right to withdraw the plea if the tentative sentence is not imposed). On March 2, 2009, he was sentenced to a probation term of 48 months, with one year to be served in the county jail. Two months later, on May 8, 2009, the trial court issued a jail overcrowding order, which released Petitioner from jail and ordered him to complete the K-Pep Residential Half-Way House program. Petitioner signed an amended order of probation that required him to complete the K-Pep program. Petitioner was not represented by counsel at the time the amended sentence was imposed. Petitioner subsequently violated his probation. On November 3, 2009, the court revoked probation, and Petitioner was sentenced to a prison term of 3-to-20 years.

Petitioner filed an application for leave to appeal to the Michigan Court of Appeals on April 29, 2009. Petitioner does not indicate what issues were raised in that appeal.<sup>1</sup> The court

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<sup>1</sup> Petitioner fails entirely to mention his direct appeal, focusing solely on his appeal from his motion for relief from judgment. The record of his appeal, however, is found in the online case record system of the Michigan Court of Appeals, *see* [http://courts.mi.gov/opinions\\_orders/case\\_search/pages/default.aspx?SearchType=1&CaseNumber=291748&CourtType\\_CaseNumber=2](http://courts.mi.gov/opinions_orders/case_search/pages/default.aspx?SearchType=1&CaseNumber=291748&CourtType_CaseNumber=2).

of appeals denied leave to appeal on May 27, 2009. Petitioner did not seek leave to appeal to the Michigan Supreme Court.

On March 30, 2011, Petitioner filed a motion for relief from judgment in the trial court, raising the same three issues<sup>2</sup> presented in his habeas application: (1) the amended sentence of probation violated the terms of his *Cobbs* agreement; (2) the amended sentence of probation was issued without due process; (3) Petitioner was deprived of the assistance of counsel at the time of the amended sentence and effective assistance of counsel on direct appeal. The trial court denied the motion on April 4, 2011. Petitioner sought leave to appeal to both the Michigan Court of Appeals and the Michigan Supreme Court, raising the same three issues. The court of appeals denied leave to appeal on November 11, 2011. The supreme court denied leave to appeal on June 25, 2012, and denied reconsideration on September 24, 2012.

Petitioner filed the instant habeas application on May 2, 2013.

## II. Statute of Limitations

Petitioner's application is barred by the one-year statute of limitations provided in 28 U.S.C. § 2244(d)(1), which became effective on April 24, 1996, as part of the Antiterrorism and Effective Death Penalty Act, PUB. L. NO. 104-132, 110 STAT. 1214 (AEDPA). Prior to enactment of the AEDPA, there was no defined period of limitation for habeas actions. Section 2244(d)(1) provides:

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<sup>2</sup>Although Petitioner states in his form petition that he raised all three issues in his state-court motion, it appears from the documents attached to the petition that Petitioner did not explicitly raise his due process claim. Arguably, therefore, his due process claim is not exhausted. However, because Petitioner already has filed his one allotted motion for relief from judgment under MICH. CT. R. 6.502(G)(1), no further remedies are available in the state courts. His due process claim therefore is considered exhausted but procedurally barred. See *Cone v. Bell*, 243 F.3d 961, 967 (6th Cir. 2001) (citing *Coleman v. Thompson*, 501 U.S. 722, 752-53 (1991)), *rev'd on other grounds*, 535 U.S. 635 (2002). Moreover, because the petition is time-barred, as discussed *infra*, the question of exhaustion has no bearing on the recommended disposition of the case.

(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2244(d)(1). The running of the statute of limitations is tolled when “a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending.” 28 U.S.C. § 2244(d)(2); *see also Duncan v. Walker*, 533 U.S. 167, 181-82 (2001) (limiting the tolling provision to only State, and not Federal, processes); *Artuz v. Bennett*, 531 U.S. 4, 8 (2000) (defining “properly filed”).

In most cases, § 2244(d)(1)(A) provides the operative date from which the one-year limitations period is measured. Under that provision, the one-year limitations period runs from “the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review.” 28 U.S.C. § 2244(d)(1)(A). The subject matter of Petitioner’s claim is revocation of probation and resentencing, which occurred on November 3, 2009. Petitioner filed an application for leave to appeal his resentencing to the Michigan Court of Appeals, which was denied on April 29, 2009. Petitioner did not seek leave to appeal to the Michigan Supreme Court. Where a petitioner has failed to pursue an avenue of appellate review available to him, the time for

seeking review at that level is counted under § 2244(d)(1)(A). *See* 28 U.S.C. § 2244(d)(1)(A) (time for filing a petition pursuant to § 2254 runs from “the date on which the judgment became final by the conclusion of direct review *or the expiration of time for seeking such review*”) (emphasis added). However, such a petitioner is not entitled to also count the 90-day period during which he could have filed a petition for certiorari to the United States Supreme Court. *See Gonzalez v. Thaler*, 132 S. Ct. 641, 655 (2012) (holding that, because the Supreme Court can review only judgments of a state’s highest court, where a petitioner fails to seek review in the state’s highest court, the judgment becomes final when the petitioner’s time for seeking that review expires). Under Michigan law, a party has 56 days in which to apply for leave to appeal to the Michigan Supreme Court. *See* MICH. CT.R. 7.302(C)(2). Accordingly, Petitioner’s conviction became final on Wednesday, July 24, 2009. Petitioner had one year from July 24, 2009, or until July 24, 2010, in which to file his habeas application challenging his resentencing. Petitioner filed on May 2, 2013. Obviously, Petitioner filed more than one year after the time for direct review expired.

Although 28 U.S.C. § 2244(d)(2) provides that the one-year statute of limitations is tolled while a duly filed petition for state collateral review is pending, the tolling provision does not “revive” the limitations period (i.e., restart the clock); it can only serve to pause a clock that has not yet fully run. *Payton v. Brigano*, 256 F.3d 405, 408 (6th Cir. 2001). Once the limitations period is expired, collateral petitions can no longer serve to avoid a statute of limitations. *Id.*; *McClendon v. Sherman*, 329 F.3d 490, 493 (6th Cir. 2003). Even where the post-conviction motion raises a claim of ineffective assistance of appellate counsel, the filing of the motion for relief from judgment does not revive the statute of limitations. *See Allen v. Yukins*, 366 F.3d 396, 401 (6th Cir. 2004) (citing

*McClendon*, 329 F.3d at 490). Because Petitioner’s one-year period expired in 2010, his motion for relief from judgment filed in 2011 did not serve to revive the limitations period.

The one-year limitations period applicable to § 2254 is a statute of limitations subject to equitable tolling. *See Holland v. Florida*, 130 S. Ct. 2549, 2560 (2010); *Akrawi v. Booker*, 572 F.3d 252, 260 (6th Cir. 2009); *Keenan v. Bagley*, 400 F.3d 417, 420 (6th Cir. 2005). A petitioner bears the burden of showing that he is entitled to equitable tolling. *See Keenan*, 400 F.3d at 420; *Allen v. Yukins*, 366 F.3d 396, 401 (6th Cir. 2004). The Sixth Circuit repeatedly has cautioned that equitable tolling should be applied “sparingly” by this Court. *See, e.g., Hall v. Warden, Lebanon Corr. Inst.*, 662 F.3d 745, 749 (6th Cir. 2011); *Robertson v. Simpson*, 624 F.3d 781, 784 (6th Cir. 2010); *Sherwood v. Prelesnik*, 579 F.3d 581, 588 (6th Cir. 2009). A petitioner seeking equitable tolling of the habeas statute of limitations has the burden of establishing two elements: “(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way.” *Holland*, 130 S. Ct. at 2562 (citing *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005)); *Lawrence*, 549 U.S. at 335; *Hall*, 662 F.3d at 750; *Akrawi*, 572 F.3d at 260.

Petitioner has failed to raise equitable tolling or allege any facts or circumstances that would warrant its application in this case. The fact that Petitioner is untrained in the law, was proceeding without a lawyer, or may have been unaware of the statute of limitations for a certain period does not warrant tolling. *See Allen*, 366 F.3d at 403-04; *see also Craig v. White*, 227 F. App’x 480, 482 (6th Cir. 2007); *Harvey v. Jones*, 179 F. App’x 294, 299-300 (6th Cir. 2006); *Martin v. Hurley*, 150 F. App’x 513, 516 (6th Cir. 2005); *Fisher v. Johnson*, 174 F.3d 710, 714 (5th Cir. 1999) (“[I]gnorance of the law, even for an incarcerated *pro se* petitioner, generally does not excuse [late] filing.”). Accordingly, Petitioner is not entitled to equitable tolling of the statute of limitations.

In *McQuiggin v. Perkins*, 133 S. Ct. 1924, 1931-32 (2013), the Supreme Court held that a habeas petitioner who can show actual innocence under the rigorous standard of *Schlup v. Delo*, 513 U.S. 298 (1995), is excused from the procedural bar of the statute of limitations under the miscarriage-of-justice exception. In order to making a showing of actual innocence under *Schlup*, a Petitioner must present new evidence showing that “it is more likely than not that no reasonable juror would have convicted [the petitioner].” *McQuiggin*, 133 S. Ct. at 1935 (quoting *Schlup*, 513 U.S. at 329) (addressing actual innocence as an exception to procedural default)). Because actual innocence provides an exception to the statute of limitations rather than a basis for equitable tolling, a petitioner who can make a showing of actual innocence need not demonstrate reasonable diligence in bringing his claim, though a court may consider the timing of the claim in determining the credibility of the evidence of actual innocence. *Id.* at 1936.

In the instant case, Petitioner makes no claim that he is actually innocent. In fact, he pled guilty to the underlying charge.<sup>3</sup> He therefore is not excused from the statute of limitations. As a consequence, his habeas petition is time-barred.

The Supreme Court has directed the District Court to give fair notice and an adequate opportunity to be heard before dismissal of a petition on statute of limitations grounds. *See Day*, 547 U.S. at 210. This report and recommendation shall therefore serve as notice that the District Court may dismiss Petitioner’s application for habeas corpus relief as time-barred. The opportunity to file objections to this report and recommendation constitutes Petitioner’s opportunity to be heard by the District Judge.

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<sup>3</sup> Furthermore, Petitioner’s principal claim is inarguable. He seems to believe that by agreeing to a probationary sentence, the court was thereafter powerless to revoke probation in response to a violation of conditions. No clearly established holding of the United States Supreme Court would support such a nonsensical proposition.

### **Recommended Disposition**

For the foregoing reasons, I recommend that the habeas corpus petition be denied because it is barred by the one-year statute of limitations. I further recommend that a certificate of appealability be denied. *See Slack v. McDaniel*, 529 U.S. 473 (2000).

Dated: June 26, 2013

/s/ Joseph G. Scoville  
U.S. Magistrate Judge

### **NOTICE TO PARTIES**

Any objections to this Report and Recommendation must be filed and served within 14 days of service of this notice on you. 28 U.S.C. § 636(b)(1)(C); FED. R. CIV. P. 72(b). All objections and responses to objections are governed by W.D. Mich. LCivR 72.3(b). Failure to file timely objections may constitute a waiver of any further right of appeal. *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981); *see Thomas v. Arn*, 474 U.S. 140 (1985).